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Jerome Hall

Indiana University School of Law

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THE LAW OF ARREST IN RELATION TO CONTEMPORARY SOCIAL PROBLEMS*

JEROME HALL†

THE history of the law of arrest¹ suggests a principle of considerable value for the study of the contemporary problem. This principle may be stated thus: The demand for security sought to be achieved through protection by professional police is opposed by political sentiments and ideals insistent upon protection *against* such professionals. The formulation of an ideal resolution of this conflict,² on the one hand, together with some knowledge of methods useful in coping with the per-

* I am obliged to Sam B. Warner and Sheldon Glueck for a number of very helpful suggestions.

† Professor of Criminal Law and Criminology, Louisiana State University Law School.

¹ See the writer's historical survey, *Legal and Social Aspects of Arrest without Warrant*, 49 Harv. L. Rev. 566-592 (1936).

History, and analysis of contemporary social problems proceed upon different levels of discussion. In the former, we deal with events that have run their course. The problem is to cast light upon the particular lines followed. Sometimes this is essayed (in a strictly institutional explanation) upon the assumption that social phenomena are subject to universal laws of causation, that certain conditions, treated apart from immediate human behavior, necessarily produced the known results. Or, it is attempted by the application of various hypotheses of human motivation viewed as directed towards the attainment of certain ends. But in a contemporary problem we are midstream. The "solutions" are not fixed but *problematic*. To the extent that we view ourselves as participants in present, social problem-solving—and that to some degree is hardly avoidable—deterministic hypotheses concerning social phenomena tend to recede. We endeavor rather to discover ethical and legal norms to guide our conduct, i.e., to formulate wise policies. But to some extent we do carry over the attitude which characterized our study of the past. To some degree we utilize like hypotheses. In light of the combined researches "correct" norms are sought. Disparity of views is inevitable. But among interested students, some degree of unanimity regarding the utility of some norms to aid in the solution of contemporary social problems results.

² E.g. ". . . the ideal police force [is] the one which affords a maximum of protection at the cost of a minimum of interference with the lawful liberty of the subject." W. L. Melville Lee, *A History of Police in England*, xii (1901).

sistent difficulties involved in attempts at actual attainment of that end, on the other, provides the skeletal framework within which analysis of the contemporary problem must rest.

I

To what extent is protection afforded against illegal arrests by police?³ The legal remedies seem obvious. They seem numerous. There is the policeman; there are his superior officers; there is the municipality, state or nation. Apart from compensation, one would expect that there might be other redress.

Normally, counsel would consider first, suit for damages against the immediate wrongdoer. And, indeed, are we not informed on every hand that the responsibility of policemen in England and the United States is the chief characteristic which distinguishes them from continental police?⁴ To be sure, the law in the books is emphatic in granting "relief." In granting, that is, a judgment against the wrongdoer.

But the value of a judgment depends upon the financial condition of the judgment-debtor. Our policemen do not accumulate fortunes like that acquired by Townsend, the famous Bow Street Runner who left £20,000. Or, if they occasionally do, the source may be such that the funds cannot be located except by commissions enjoying large powers and facilities to investigate. Ordinarily, the prospects of satisfying a judgment against a policeman are poor indeed. Few suits are therefore brought.⁵ Thus the Anglo-American theory, at least when directly applied, collapses at its initial application to fact.⁶

But police officials receive salaries from known sources. What, then, of garnishment? In a few states this remedy is available;⁷ but not in the vast

³ Some protection is derived through social disapproval of police misconduct, self-imposed limitations, departmental measures to control subordinates, advance in methods of detection, and other factors which are not discussed here.

⁴ See Laski, *The Responsibility of the State in England*, 32 *Harv. L. Rev.* 447, 458 (1919).

⁵ Cf. Bohlen and Shulman, *Effect of Subsequent Misconduct upon a Lawful Arrest*, 28 *Col. L. Rev.* 844 (1928) (footnote); Train, *The Prisoner at the Bar* 48 (1923).

⁶ In states where the common law writ *ad respondendum* may be issued in case of fraud or wilful injury, upon judgment for plaintiff, execution of the *capias ad satisfaciendum* is frequently effective where all else fails. But again effectiveness depends upon enforcement. If the debtor is a sheriff or constable, he might himself be called upon to execute the *capias*. Or, at best, one official is called upon to seize and incarcerate another official. Can there be any great expectation of honest cooperation in such cases? On the contrary, it may be hazarded that in many places an attempt to enforce such an extraordinary remedy would be more damaging to the courageous or foolhardy creditor than to the policeman.

⁷ *Mitchell v. Miller*, 95 Minn. 62, 103 N.W. 716 (1905); *Adams v. Tyler*, 121 Mass. 380 (1876); *Rodman v. Musselman*, 12 Bush. (Ky.) 354 (1876) (granting garnishment as to municipi-

majority of states.⁸ The most frequent ground is "public policy."⁹ Sometimes such policy rests upon the need to retain the services of the officer—which apparently requires that he be kept judgment-proof.¹⁰ Again, it is urged that other public officials "should not be compelled to devote their time and attention . . . to making appearances in garnishment cases."¹¹ In proceedings to reach money due the marshal of Marietta, Georgia, who received more than \$5,000 per annum, the court held this was salary, not wages. Hence garnishment could not be brought under the statute.¹² The prevalent attitude was expressed by the Missouri court which held that these were "contests about which the corporation has no interest."¹³ Debts incurred in the performance of public services are not distinguished.¹⁴

The policeman is, indeed, merely a public instrument. Hence he does not regard a debt incurred in the public service as a personal obligation. And in large measure this view is justifiable. The hazards of such employment in any large city, involving at least the retainer of counsel and the defense of litigation, would, if anything more than merely formal, impose an impossible burden. Survival of a rule of liability which had utility when police service was universal (and arrests apt to be made or ordered by persons of some means) is an anachronism as obvious only as the utter worthlessness of the rule in modern conditions when applied against professional policemen.

But this official is also employed in the business of a political association. It is right both legally and morally that a principal answer for the torts of his servant. And since the principal is a sovereign state or a municipality, the vexing problem of financial worth recedes. But the problem of establishing the liability of a sovereign state or of a city presents even greater obstacles to recovery. It will suffice to confine discussion to the

pal but not as to state officers, since the state cannot be sued); *City Council of Montgomery v. Van Dorn*, 41 Ala. 505 (1868) (based upon Ala. L. 1866, p. 67); *Cavender v. Hewitt*, 145 Tenn. 471, 239 S.W. 767 (1921) (based on statute); *Dunkley v. Marquette*, 157 Mich. 339, 122 N.W. 126 (1909).

⁸ Cf. 6 McQuillin, *The Law of Municipal Corporations* § 2681 (2d ed. 1928).

⁹ *Webb v. McCauley*, 4 Bush. (Ky.) 8 (1868).

¹⁰ *Oliver, Finnie & Co. v. Athey*, 79 Tenn. 149 (1883).

¹¹ *Haddock v. McDonald*, 98 Kan. 628, 159 Pac. 402 (1916).

¹² *McLellan v. Young*, 54 Ga. 399 (1875).

¹³ *Hawthorn v. St. Louis*, 11 Mo. 59 (1847).

¹⁴ Cf. ". . . most remarkable of all was perhaps the Pluchard case in which a civilian obtained damages for a fall occasioned by an involuntary collision with a policeman in pursuit of a thief. (*Recueil*), 1029 (1910)." Laski, *op. cit. supra* note 4, at 469.

municipality, which presents the lesser difficulties. Here we have a corporation, organized under a state charter and doing business on a large scale. If liability can be established, then relief in fact normally exists.

It appears at once that the problem is part of the larger one of municipal liability in general. Distinctions drawn between corporate and governmental functions,¹⁵ and exceptions made to the rule *respondeat superior*, supply the avenues for denial of liability.¹⁶ As regards police officers, absence of liability is the uniform rule.¹⁷ Not only the initial false arrest but also subsequent false imprisonment, even where it involves superior officials, is held the sole concern of the individuals.¹⁸

It thus appears, subject to few exceptions, that where there is liability (as in the case of the policeman), the fact of financial irresponsibility is operative and, presumably, conclusive; while, where financial responsibility exists (as in the case of a city), there is no liability.

This disparity between theory and fact, between an empty shell of relief and substantial compensation, could not remain unnoticed. But the confused and unprogressive state of the law of public associations (includ-

¹⁵ Some indication of the rigidity of the doctrine may be seen in *Jones v. City of New Orleans*, 143 La. 1074, 79 So. 865 (1918), where the city was held not liable for a death caused by a policeman assigned to a Railroad Commission to protect the property of a railroad, even though the officer received his salary from the special department.

¹⁶ See Note, 11 Va. L. Rev. 315 (1925); Edward F. White, Negligence of Municipal Corporations § 36, p. 61 and note 12 (1920); § 67 and note 15, p. 103; W. L. Williams, The Liability of Municipal Corporations for Tort § 19, pp. 37-40 (1901); 6 McQuillin, The Law of Municipal Corporations § 2591, pp. 405-409 (1928); cf. *Hart v. Bridgeport*, 13 Blatchf. (Tenn.) 289 (Fed. Cas. No. 6-149, 1876); *Johnson City v. Wolfe*, 103 Tenn. 277, 279, 52 S.W. 991 (1899).

¹⁷ Cf. Borchard, Government Liability in Tort, 34 Yale L. J. 240-1 (1925).

¹⁸ David, Municipal Liability in Tort in California, 7 So. Calif. L. Rev. 302 (1934).

Some departure from the common law doctrine has been made in England and in Canada. (For citations, see *id.*, at 303.) In the United States a recent development of some significance is represented by *Evans v. Berry* decided in New York in 1932. On February 5, 1927, the plaintiff was injured by a stray bullet fired by a police officer pursuing two robbers. On December 10th the city council passed an ordinance authorizing a local board to make just and equitable awards to persons injured in the past or in the future by a police officer engaged in arresting any person or in executing any legal process. On Jan. 26, 1928, the board awarded the plaintiff \$6,740. The Appellate Division held the award invalid (258 N.Y.S. 473, 236 App. Div. 334 (1932)) but on further appeal, it was upheld as a proper, indeed commendable, recognition of a moral obligation and an exercise of the equitable power of the city. ("Assumption of liability does not constitute a gift or gratuity to the injured person so long as it is the legitimate recognition of an equitable claim." Pound, J., in *Evans v. Berry*, 262 N.Y. 61, 71, 186 N.E. 203, 206 (1933); and cf. Note, 42 Yale L. J. 241 (1932).) The result reached was, indeed, equitable. But the basis of relief, resting, as it did, upon grace and not upon any legal right to compel compensation, indicates no retreat from the traditional irresponsibility of the municipal corporation.

ing that of municipal corporations) makes it difficult to construct out of that law a theoretically sound basis for relief. Only within the last decade have social-utilitarian ideas perceptibly influenced thinking in this field.¹⁹ Certainly the movement to spread losses which cannot fairly be levied upon individuals, seems especially relevant to an enterprise like police.

Without doubt, the most important step towards effective relief attempted thus far is provision for the filing of official bonds.²⁰ Many states have enacted such statutes. But the village constable and the county sheriff, rather than the city policeman, are the officials typically covered. Moreover, there are many serious limitations upon such provision for remedy. Chiefly, the difficulty results from the interposition of a special instrument (the bond) and the relevant law of suretyship—a body of rules which in modern times developed especially to meet the needs of commercial transactions. Consequently, there is very rigid interpretation as to whether the principal on the bond (the officer) was acting within the scope of his authority when he committed the tort complained of. That was the issue in a recent Maryland case where action was brought against a sheriff and his surety. A convict under sentence of death had escaped. The sheriff, believing that the plaintiff knew of the fugitive's hiding place, arrested her and imprisoned her in the county jail for thirty days. Despite abuse and torture, she denied guilt or knowledge. In the opinion rendered, the initial and decisive premise was that "the contract of a surety upon an official bond is subject to the strictest construction . . . and nothing is to be taken by construction against the obligors."²¹ It was held that the issue in such cases turns upon whether the officer was acting *virtute officii* or *colore officii*.²² Here the sheriff had arrested without a warrant and without reasonable grounds of suspicion. He did not take the plaintiff before a magistrate, but imprisoned her without any commitment. It was held that he did not act *virtute officii*, and that the bond contained "no clause to cover an abuse or usurpation of power."

In a Kentucky case,²³ police officers arrested the plaintiff without a war-

¹⁹ The work of Professor Borchard is especially noteworthy. See his *State and Municipal Liability in Tort*, 20 Am. Bar Ass'n J. 747 (1934), where he gives the most important citations.

²⁰ Cf. 6 McQuillin, *op. cit. supra* note 16, 409-10, note 1.

²¹ *State, for the Use of Brooks v. Fidelity and Deposit Co.*, 147 Md. 194, 127 Atl. 758 (1925).

²² The former are "where a man doing an act within the limits of his official authority exercises that authority improperly, or abuses the discretion placed in him. The latter are where the act committed is of such nature that the office gives him no authority to do it; in the doing of that act he is not to be considered as an officer."

And cf. Tooke, *The Extension of Municipal Liability in Tort*, 19 Va. L. Rev. 117-18 (1932).

²³ *Taylor v. Shields*, 183 Ky. 669, 210 S.W. 168 (1919).

rant, and took him to a station in Louisville where they beat him. The plaintiff sued the policemen and the Chicago Bonding and Surety Co. for \$5,000. The torts were held to be the individual acts of the policemen "and not their official acts done by virtue of their office."²⁴ In a later Kentucky case, the plaintiff, a student at the state university, had been devoting part time to the sale of an automobile accessory. Police officers arrested him without a warrant, and charged him with vagrancy and operating a confidence game. They photographed and measured him, and applied "the usual humiliating routine of men charged with crime."²⁵ Judgment against the policemen was upheld. That against the Fidelity and Casualty Company of New York, however, was reversed despite the fact that "these policemen . . . in good faith believed the appellee had committed a felony."²⁶ In a more recent case,²⁷ the Kentucky court held that if a crime had been committed in the officer's presence and the officer unnecessarily struck the plaintiff, the surety was liable, but that in any event "punitive damages are never allowable against a surety on an official bond." Judgment for the plaintiff was reversed.

Obviously a surety should not be held answerable for all misconduct by a bonded official. Thus, where two officers quarrelled, and one shot at another, killing a bystander, upon no reasonable construction could liability *on the bond* be based.²⁸ But what of the above decisions where police officers made arrests *bona fide*, or abused arrestees in an effort to secure evidence of guilt? Bare recital of the facts shows that the most serious injuries, the abuses most flagrant, are the very ones where compensation is denied. Where the need for protection is greatest, the conduct is only *colore officii*.²⁹ A few courts have refused to permit such nullification of the apparent legislative intent. Thus in a case where the surety pleaded that no offense had in fact been committed, the Court of Appeals of Texas held that only good faith was required.³⁰

²⁴ "If they acted . . . without Taylor having committed a public offense in their presence, then they acted as individuals and not as officers." *Id.* at 673-4.

²⁵ Fidelity & Casualty Company of New York v. White, 209 Ky. 402, 272 S.W. 902 (1925).

²⁶ ". . . that belief was the result of a negligent misunderstanding of the facts, and there was in fact no reasonable grounds for their so believing." *Id.*, at 407.

So, too, Shelton v. Nat'l Surety Co. of N.Y., 235 Ky. 778, 32 S.W. (2d) 339 (1930); Holmes v. Blyler, 80 Ia. 365, 45 N.W. 756 (1890); Scott v. Feilschmidt, 191 Ia. 347, 182 N.W. 382 (1921); Taylor v. Morgan, 43 Okla. 142, 141 Pac. 679 (1914); Burge v. Scarbrough, 211 Ala. 377, 100 So. 653 (1924).

²⁷ Indemnity Ins. Co. of North America v. Bonta, 217 Ky. 265, 289 S.W. 231 (1926).

²⁸ So held in Hodge v. U.S. F. and G. Co., 42 Ga. App. 84, 155 S.E. 95 (1930).

²⁹ Sometimes it is said that the surety is liable for only misfeasance, not malfeasance of the officer. See Note, 31 W.Va. L. Q. 225 (1925).

³⁰ Riter v. Neatherly, 157 S.W. 439 (Tex. Civ. App. 1913). So, too, in Branch v. Guinn,

Colore officii is only one of several avenues of escape provided by the law of suretyship. In a recent California case judgment against a police officer for \$2,000 for false arrest, assault and imprisonment, and for \$1,000 against sureties on his bond, was reversed. Such action could be maintained "only by the obligee named in the bond."³¹ Only the municipality was so named. In another case, a police officer in Knoxville, Tennessee, arrested a man for violation of a traffic ordinance, and when he began to run away, shot and severely wounded him. In an attempt to avoid the technicality noted, the action was brought in the name of the city for the use of the injured person. Nevertheless it was held that "... the bond upon which the plaintiff's action is predicated was not given for his benefit and for his protection."³² But not all courts have so rigidly applied the rules of suretyship. In an Illinois case the same technical objection was made. Said the court: "It is difficult to understand for whose benefit the condition was made if not for those whom he might unlawfully assault while being arrested or while under arrest."³³

Still other technicalities frustrate the purposes of legislation requiring official bonds. Thus, the death of a city marshal released his surety from liability for the deputy marshal's tort.³⁴ Again, a surety was held not liable for torts of policemen appointed by a city marshal, because of the absence of express statutory provision.³⁵ In a Washington case³⁶ the surety escaped liability because the minutes of the city council were not in strict compliance with the statute requiring a bond "in such penal sum as the city council shall determine." The minutes did show a recommendation by the mayor, and approval by the council, but no formal submission to a vote. Liability is further avoided because of failure of officials to require or to approve a bond, failure to do so in exact compliance with the statute, failure to require an official to renew a bond, failure to require that the

242 S.W. 482 (Tex. Civ. App. 1922) where failure by a sheriff to bring the plaintiff before a magistrate as required, was held to be official misconduct for which the surety was liable. Cf. *Gomez v. Scanlan*, 155 Cal. 528, 102 Pac. 12 (1909); and *Weber v. Doust*, 81 Wash. 668, 143 Pac. 148 (1914), rev'd in 84 Wash. 330, 146 Pac. 623 (1915).

³¹ *Sunter v. Fraser*, 194 Cal. 337, 340, 228 Pac. 660, 661 (1924). Cf. "... the bond was not given for the protection of third parties but for the protection of the city alone." *City of Eaton Rapids v. Stump*, 127 Mich. 1, 86 N.W. 438 (1901).

³² *Carr v. City of Knoxville*, 144 Tenn. 483, 487, 234 S.W. 328, 329 (1921). Cf. *U.S. F. & G. Co. v. Crittenden*, 62 Tex. Civ. App. 283, 131 S.W. 232 (1910).

³³ *City of Cairo for use of Robinson v. Sheehan*, 173 Ill. App. 464, 469 (1912). So, too, in effect have held the Iowa and the Alabama courts: *Scott v. Feilschmidt*, 191 Ia. 347, 182 N.W. 382 (1921); *Ingram v. Evans*, 227 Ala. 14, 148 So. 593 (1933).

³⁴ *Veatch v. Derrick*, 224 Ky. 332, 6 S.W. (2d) 279 (1928).

³⁵ *Comm. for use of Williams v. Boles*, 160 Ky. 775, 170 S.W. 170 (1914).

³⁶ *Finney v. Shannon*, 166 Wash. 28, 6 Pac. (2d) 360 (1931).

bond be maintained in the full amount required, with the result that if the surety has once paid a judgment on a particular bond, subsequent claimants can hold it only to the balance of its obligation, and so on.

Thus in many of the states where official bonds are required, the legislative intent to afford compensation for official lawlessness is entirely nullified or rigorously restricted. Between the injured individual who seeks redress and the public corporation whose servant committed the tort, there are interposed the law of suretyship and strict rules of statutory construction. The results are manifest. Instead of providing relief, damage is augmented.³⁷

For another, quite different reason, action on a bond is very inadequate. The surety in most cases is a great corporation. The plaintiff is an individual whose resources are scant—that one can frequently discover from the reports themselves, despite their factual incompleteness. A student, a minor, a woman, a transient, a local petty gambler or inebriate—these were plaintiffs in the above cases. The existence of a web of technicality to defeat recovery is itself some evidence of competent counsel at work over a long period of time, accumulating the benefits of the past experience of a large corporation doing a national business, and amply supplied with the instruments of defense, legal and financial.³⁸

It may be noted, in passing, that despite the recent growth of equity jurisdiction, an injunction will not be issued to prevent a threatened illegal arrest.³⁹ Under the widest possible interpretation of the cases, the threat

³⁷ In a number of states, provision is made for the reimbursement of an official who has successfully defended a suit arising from his employment. On the other hand, a private individual who has suffered injury must, under our system, bear the costs of litigation even though he wins the suit.

³⁸ *E.g.*, in Kentucky, where a rather large number of such cases appear in the appellate reports, there seems to be a definite, progressive limitation of the value of the remedy as one technicality after another gained judicial approval, to block relief entirely in the later cases.

³⁹ Thus a New York court denied a petition for such an injunction on the ground that there were adequate remedies by way of habeas corpus and suit for damages. (*Burch v. Cavanaugh*, 12 Abb. Pr. (N.S.) (N.Y.) 411 (1872)). To the remonstrance that the city marshal was "of small pecuniary means," the court replied that "the insolvency of a person who threatens to make an arrest cannot be ground for an injunction to restrain him." In an earlier New York case (*Wood v. City of Brooklyn*, 14 Barb. (N.Y.) 426 (1852)), an injunction was issued to restrain a threatened arrest for selling liquor. The grounds for relief were that the ordinance regulating such sale was void, and that the complainant would suffer an irreparable damage to a business which supplied a livelihood for himself and his family. But in a later decision, the New York court refused to enjoin an arrest where the sole basis for relief was irreparable loss to property. (*Davis v. The American Society for the Prevention of Cruelty to Animals*, 75 N.Y. 364 (1878)). The reason advanced was that a court of equity would be compelled to determine the legality of the arrest, and be required, therefore, to decide the guilt or innocence of the petitioner. This, the court stated (though with what soundness seems dubious) would

of an irreparable loss to property is an essential condition of such relief. Accordingly, as regards the overwhelming majority of persons who suffer false arrest, imprisonment and battery at the hands of police, preventive relief is precluded. We have noted the tendency to classify extreme abuse as mere *colore officii*. Here, poverty operates in like fashion to narrow even the theoretical availability of a remedy. The net result—the propertyless individual and the person most grievously injured by abusive police (are they not likely to be one and the same class of persons?) are quite without relief. This means, in turn, that they must continue to meet and bear official lawlessness.

The conjunction of the various legal doctrines discussed and of the assumption regarding the pecuniary value of suit against police is such that potentially effective legal remedy, i.e. remedy against a financially responsible party, is very limited, and even here it is further restricted by numerous technicalities.

This non-availability of potentially effective legal remedy is not the outcome of the law of arrest, or of the law of torts, but rather results from the dominance of other rules. Thus it is the law of municipal corporations which bars suit against the city, as does other public law bar suit against the state. Again it is the law of municipal corporations that almost everywhere prohibits garnishment of the policeman's salary. It is the law of suretyship that limits actions upon bonds. It is the law governing the issuance of injunctions that bars equitable relief for threatened false arrest. These bodies of rules have grown from diverse sources and in response to needs other than those arising from the problem of arrest or even that of police in general. Equally clear is the fact that there has been no deliberate intention to render rules impotent by restrictive technicality. With the rise of a professional police force and of an enormous body of diversified substantive law, men have probed into this *corpus juris* for instrumentalities that might be effective under the changed conditions. Integration of the various lines of attack reveals the failure to solve the existing problem.

mean that in such cases "the trial of offenders in the constitutional mode prescribed by law, would forever be prohibited." The earlier case was distinguished upon the ground that there, since the ordinance was void, it was not necessary to determine the guilt or innocence of the complainant prior to issuance of an injunction (*cf.* *Murphy v. Board of Police of New York*, 63 How. Pr. (N.Y.) 396 (1882)). But in an Ohio case where a company sought, during the course of a strike, to enjoin the arrest of strike breakers brought into the city by the company, a federal court did not hesitate to determine that the men had committed no offense and that their arrest was therefore illegal. An injunction was accordingly issued against the Mayor and Chief of Police of Cleveland. (*American Steel and Wire Co. v. Davis*, 261 Fed. 800 (1919)).

II

Rules take on significance when viewed in relation to the persons they affect and the situations to which they are applied. We turn therefore to several types of cases in which illegal apprehensions occur, and to another stage in the administrative process where the incidence of illegality is frequent. Emphasis has been placed upon illegal apprehension without a warrant.⁴⁰ But arrest includes not only apprehension but detention as well.⁴¹ The rules prescribed are clear and specific: (1) the officer making the arrest *must* bring the arrestee before a magistrate, and (2) he must do this *without delay*.⁴²

Cases in the appellate reports are helpful in the further analysis of the problem. Not quantitatively so, of course, because they represent only the transactions of the highest tribunals. They cannot be taken as an index of suits filed in the *nisi prius* courts. And these latter, even if known, no doubt represent but a small fraction of like torts committed by police. But appellate court cases are helpful not only as authoritative determinations of the rules, but even more, as descriptions of typical situations where abuse occurs. These situations in conjunction with the rules, objectify important aspects of the contemporary problem of arrest.

1. *Drunkenness*.—The Chief of Police of Cambridge, Massachusetts, found one Brock "in a public place in a state of intoxication, disorderly and disturbing the peace."⁴³ He took him to the police station, held him there for a short time, and discharged him sober. Gray, J., held that the arrest was only "a preliminary step towards taking the prisoner before a court. The defendant . . . having failed to do this, cannot justify the arrest." Judgment for the plaintiff in the sum of three hundred dollars was affirmed.

The Massachusetts statute was subsequently modified to provide that in cases of arrest of intoxicated persons, the officer "may" (instead of "shall," as the statute provided at the time of the *Brock* case) make a complaint. Nevertheless, Ames, J., held that "may" and "shall" were equivalent terms. The facts facilitated interpretation of the new statute as a departure from the old, for the officer did not imprison the plaintiff but re-

⁴⁰ It is obvious that there can be and is illegal apprehension by officers acting with a warrant. Indeed, violation of any of the rules governing arrest has like significance here.

⁴¹ It is a fine question whether in point of fact there can be apprehension without detention—*i.e.*, for a fractional period of time. The logical difficulty, however, is not a practical one.

⁴² See Bohlen and Shulman, *Effect of Subsequent Misconduct upon a Lawful Arrest*, 28 Col. L. Rev. 841 (1928); Am. L. Inst. Code of Cr. Proc. §§ 6, 35 and 36 (1931); and Alexander, *Law of Arrest*, 81 ff. (1932).

⁴³ *Brock v. Stimson*, 108 Mass. 520 (1871).

leased him on the way to the lock-up.⁴⁴ Despite that and regardless of the statutory change, the court followed *Brock v. Stimson* on the ground that "the arrest intended [by the Legislature] is such as is incident to the service of legal process."⁴⁵

In a later Massachusetts case⁴⁶ of like arrest, the fact that a severe flood occurred, and that no justice was available, did not cause the court to relax the rule. But the plaintiff requested his discharge from the jail, and the court held that if he intended thereby "to release any damages on account of a failure to make a complaint," he was not entitled to recover.⁴⁷

The above cases reveal the judicial insistence upon police work as purely ministerial. The rigor of this view is not lessened by the fact that the arrestee did not sustain any actual damage, or even that he may have benefited. In any event, the duty of the officer is to produce the arrestee in court.⁴⁸

2. *Vagrancy*.—In August of 1918, E. E. Miller arrived in the town of Tehama, California. He had been there only a few minutes when the local marshal accosted him, and inquired as to his business. Miller stated that he was going to a neighboring city to get a job. The marshal offered him

⁴⁴ *Phillips v. Fadden*, 125 Mass. 198 (1878).

⁴⁵ A North Carolina court in a similar case of arrest for intoxication, and subsequent discharge by the officer, declared that: "The constable thus constituted himself the judge, jury, and executioner. This is the best description of despotism." *State v. Parker*, 75 N.C. 189 (1876).

It is, of course, held generally that intoxication is a proper ground for delaying the appearance in court. And it was so held even though the arrestee was sufficiently in possession of his faculties to be able to look after his rights. (*Arneson v. Thorstad*, 72 Iowa 145, 33 N.W. 607 (1887)).

⁴⁶ *Caffrey v. Drugan*, 144 Mass. 294, 11 N.E. 96 (1887).

⁴⁷ The above are the general rules. But in 1891 Massachusetts passed a special statute to legalize release of persons arrested for drunkenness, without any appearance in court. (Mass. Gen. Laws 1921, c. 272, §§ 45, 46). Upon recovering from intoxication, the arrested person may make a written request to be released from custody. He must give certain information, and state also that he has not been arrested for drunkenness four times during the preceding year. The officer in charge must endorse his opinion of the probable truth of the statement; and a probation officer, after investigation must do likewise. The statute further provides that an officer shall not be liable for illegal arrest or imprisonment if the arrestee is so released at his request. In such a case, the Massachusetts court held that there was no liability, not only because of the statute but also because the plaintiff, by asking to be freed from an arrest without arraignment "impliedly waives any claim for damages which otherwise he might have had against the officer." *Horgan v. Boston Elevated Co.*, 208 Mass. 287, 94 N.E. 386 (1911).

⁴⁸ We find similar insistence in the middle of the 18th century. Thus: "... a Constable is to remember, that he is to apprehend Offenders and not to determine Offenses; that being the Office of the Magistrate only, before whom every Prisoner taken into Custody for any Offense should be carried, in the Officer's Justification, who cannot otherwise discharge him with Safety." Fielding, *Treatise on the Office of Constable* 290-291 (1761).

immediate employment, and, it being refused, arrested him without a warrant, for vagrancy, and imprisoned him in the local jail for five hours. It happened, however, that Miller had \$465 in his pocket—enough, at least, to employ counsel who recovered judgment for \$450 for false imprisonment.⁴⁹

A somewhat similar type of case deals with the arrest of women suspected of prostitution. Thus in a Maine case such a woman was arrested as "an idle and disorderly person having no visible means of support." On the evening of the same day a deputy sheriff released her at the request of her mother. Two weeks later she sued for false imprisonment, and recovered judgment for \$100.⁵⁰

3. *Detention to facilitate investigation.*—Two Boston policemen arrested a Cambridge resident who had for twenty-five years been engaged in the produce business and occasionally, also, in the business of buying and selling railroad tickets. Suspecting that he had purchased a stolen ticket, the officers took him first to a railroad office, then to a city police station, where he was "booked" on the charge of "being a suspicious person." After imprisonment for little more than an hour, he was released. The appellate court held that the trial judge erred in not instructing the jury: (1) that failure to take the arrestee before a court for examination without unreasonable delay made the defendants liable; (2) that the officers had no right to delay taking the arrestee before the court while they conducted an investigation;⁵¹ and (3) that the officers "had no right to discharge him from arrest without having taken him before the court."⁵² It was held, too, that if an officer's suspicions prove unfounded, he is not required to make a complaint, but he must none the less bring his prisoner before a magistrate.⁵³

⁴⁹ *Miller v. Turner*, 49 Cal. App. 653 (1920). Cf. *Grossman*, Who is a Vagrant in California?, 33 Calif. L. Rev. 506 (1935), and *Ames*, A Reply, 33 Calif. L. Rev. 616 (1935).

⁵⁰ *Hefler v. Hunt*, 120 Me. 10, 112 Atl. 675 (1921); cf. *Pinkerton v. Verberg*, 78 Mich. 573, 44 N.W. 579 (1899)—an arrest for street-walking. Judgment for plaintiff was based chiefly on the ground that no offense had been committed in the officer's presence; so too, in *People v. Bush*, 1 Wheeler Cr. Cas. 138 (N.Y. 1823).

⁵¹ As early as 1825 in a case where a felony had been committed and an officer sought to justify an imprisonment for three days on the ground that he was collecting evidence, the English court held that "the law gives no authority even to a justice to detain a person suspected, but for a reasonable time till he may be examined." *Wright v. Court*, 4 B. & C. 596 (1825). Cf. *Harkness v. Steel*, 159 Ind. 286, 64 N.E. 875 (1902).

⁵² *Keefe v. Hart*, 213 Mass. 476, 100 N.E. 558 (1913). Numerous citations are given.

⁵³ A few decisions relax the rigor of the rule in one respect. As far back as 1816 in a *nisi prius* case (*McCloughin v. Clayton & Riding*, Holt (N.P.) 478 (1816)) a constable arrested and searched the plaintiff, and then immediately released him. *Bayley, J.*, held: "If the law gives

Accompanying such illegal imprisonment is a whole series of abuses. Several studies give special attention to the practice of holding prisoners *incommunicado*,⁵⁴ and to that congeries of abuses known as the "third degree." These practices do not necessarily coincide with failure to produce the arrestee before a magistrate. But they preponderate in that direction. Judicial proceedings result in the appearance of defense counsel. The prisoner is definitely known to be in the custody of the police. *Habeas corpus* can therefore be effective. Other legal guarantees also operate to afford some measure of protection; *pro tanto* they increase the difficulties of sweating to induce confessions. In short, the whole level of official activity is apt to be modified, once the defendant sets his foot in court. Thus arrest without a warrant followed by imprisonment and delay or failure to bring the arrestee before a magistrate is the likeliest area for "official lawlessness."⁵⁵

4. *Arrests on behalf of foreign jurisdictions.*—Quite a different problem is revealed by cases dealing with the arrest of supposed fugitives from justice. In such a case a Minnesota sheriff arrested a transient upon receipt of information from officials of McHenry County, Illinois, relating to the larceny of horses, and describing the thief. The arrestee was imprisoned

a constable the right to apprehend on suspicion upon a reasonable charge of felony, it would be an absurdity if (upon finding the suspicion groundless) he was precluded from discharging the prisoner out of his custody." (*Id.*, at 481.) The M'Cloughin case was discussed by the Maine court in *Burke v. Bell*, 36 Me. 317 (1853), and interpreted to apply only where an arrest was made upon suspicion without a warrant, and the suspicions vanished shortly thereafter (i.e., a reasonable time within which delivery to a magistrate must be made in any event). But a later Maine case (*Therriault et al. v. Breton*, 114 Me. 137, 95 Atl. 699 (1915)) carried the exception much farther. The plaintiff was arrested for the supposed theft of a pig; but next day the pig was found. The owner refused to sign a complaint, and the plaintiff was discharged. The court distinguished between the duties of police officers in misdemeanors and in felonies. In the former they must take the arrestee before a court within a reasonable time. But in a felony case, the police have reasonable time to investigate, and if their suspicions then disappear, they may discharge the arrestee without incurring any liability. The Maine rule is a rare one, and unsupportable on general authority. *Therriault v. Breton* relied upon *Burke v. Bell*. That case, however, imposed liability. The M'Cloughin case was a release by the officer immediately after the apprehension. In the *Therriault* case the arrestee was placed in jail. The utmost leeway allowed would seem to be release immediately after apprehension without incarceration having taken place. But *cf. Atchison, Topeka and Santa Fe Ry. Co. v. Hinsdell*, 76 Kan. 74, 90 Pac. 800 (1907). And *cf. infra* for discussion of the attempted distinction between "arrest" and "detention."

⁵⁴ *Leger v. Warren*, 62 Ohio St. 500, 57 N.E. 506 (1900); *State v. Condit*, 307 Mo. 393, 270 S.W. 286 (1925); *People v. Cavanaugh*, 246 Mich. 680, 225 N.W. 501 (1929); *State v. Scarborough*, 167 La. 484, 119 So. 523 (1928).

⁵⁵ See National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 201-204 (1931); and the Am. Bar Ass'n Report of the Comm. on Lawless Enforcement of Law (1930).

for five days while the Minnesota sheriff awaited the Illinois requisition for extradition. None having arrived, he released the arrestee who had not been brought before any magistrate. The court held that such imprisonment for five days was, as a matter of law, unreasonable and that the jury should have been so instructed.⁵⁶

In a New York suit for false imprisonment, it was shown that the Syracuse police department had received information by telephone from Buffalo officials to the effect that a passenger on a Syracuse-bound train was wanted for burglary. An arrest, following the description given, was made that night. The arrestee was released the next afternoon without having been brought before a magistrate. The policemen sought to escape liability upon the ground that their duties ended when they delivered the prisoner to their superior officer; also that they had not imprisoned the arrestee for an unreasonable time. Both defenses were held insufficient.⁵⁷

5. *Inadequate administrative facilities.*—Finally there needs to be mentioned a situation which seems to result from imperfect administrative machinery, aggravated in some cases, apparently, by gross negligence or spite. Perhaps the most extreme case reported, occurred in Vermont in 1895. The plaintiff was arrested for perjury on a warrant issued by the county court. The court had adjourned when the plaintiff was taken into custody. He was thereupon locked in the county jail and imprisoned for *six months* until the states attorney ordered his release.⁵⁸ The court held that the states attorney had such power "if in his judgment, the adminis-

⁵⁶ *Cochran v. Toher*, 14 Minn. 385 (1869).

⁵⁷ "A police officer should have no discretionary power to hold suspected persons under arrest . . ." said the court. *Davis v. Carroll*, 172 App. Div. 729, 159 N.Y.S. 568 (1916). A citizen of Alabama was traveling through Georgia where a sheriff thought he recognized him as an escaped Louisiana convict. He arrested and imprisoned the supposed fugitive for several days until a Louisiana official arrived and determined that the arrestee was not the escaped felon. No warrant had been taken out. The Georgia court reversed judgment for twenty-five dollars, stating, with considerable warmth, that the case was not one for mere nominal damages. (*Potter v. Swindle*, 77 Ga. 419, 3 S.E. 94 (1887)).

⁵⁸ *Kent v. Miles*, 68 Vt. 49, 33 Atl. 768 (1895).

Cf. as to London over a century ago—"Does it ever happen that a person is kept under charge all night, in consequence of there being no magistrate in attendance to receive the information against him? It is possible such a thing may have happened, but I do not know of any instance of it within my own recollection." Chief Clerk at Bow Street Court in the Report on the Police of the Metropolis 48-49 (1816); also *cf. id.*, at 70.

And for a contemporary New York practice as to youths, see the Report of the New York Crime Commission (1931) at 181, showing that "an appreciable number of cases were held longer than the required period"—i.e., longer than until the morning after the arrest. The condition of the New York "bull pen" described in the report, would give penologists food for thought as to the rate of progress.

tration of justice required it." But the decision overruling the plaintiff's demurrer to the sheriff's plea was affirmed.⁵⁹

III

The abuses evidenced by the reports might be condoned if they were infrequent; not, indeed, on principle, but as cases falling within an inevitable margin of human fallibility. The seriousness of the problem increases as the number of abuses mounts. Of major importance, therefore, is the frequency of the illegal practices described.

On many phases of criminal law administration, statistics are available, and, occasionally, in abundance. Careful sifting of the data leads frequently to very significant results. But suppose it is desired to investigate such a very important phenomenon as the number of persons arrested and discharged by police without being brought before a judge. A mere handful of cities publish such records, and it is generally impossible for anyone—even the police themselves—to know what is going on in this regard.⁶⁰

Notable exceptions are the reports of Boston, Detroit and Los Angeles. In Boston, approximately 3,500 "suspicious persons" were arrested each year during 1928-1933. Practically all of them were discharged by the police without any appearance in court. During the same period an average of 476 persons were arrested for "disorderly conduct." All of them were released by the police without appearance in court. The Police Commissioner's Reports reveal similar practices for twelve other charges—

⁵⁹ The problem is related to that of long incarceration pending the grand jury or the trial court. These are, of course, cases of legal imprisonment. Apparently there is no call to provide compensation, regardless of the length of such imprisonment and of the fact that the arrestee is subsequently discharged or found not guilty.

We have indeed made some progress in the past century and a half. E.g., "inasmuch as no provision is made for them, but bread and water, and the difficulty, if not the impossibility, of obtaining admission for their friends to see them, renders it a melancholy and dangerous situation, and appears to us contrary to the principle of our happy Constitution, which has wisely provided that no punishment ought to take place till after conviction." The Presentment of the Grand Jury for the County of Middlesex. From Fifth Edition of *An Impartial Statement of the Inhuman Cruelties Discovered: in the Coldbath-Fields Prison, etc.*, London, page 7 (about 1800).

Cf. *Knight v. Baker*, 117 Ore. 492, 244 Pac. 543 (1926) (where the plaintiff was imprisoned for 17 days without any commitment, warrant, examination by court or charge filed against him); *Greene v. Kennedy*, 46 Barb. (N.Y.) 527 (1866) (such imprisonment for 8 days); *Anderson v. Beck*, 64 Miss. 113, 8 So. 167 (1886) (where an imprisonment for 30 days seems to have been motivated purely by spite).

Cf. Am. Bar Ass'n Comm. Rep't, *op. cit. supra* note 55, at 4, and citations there given.

⁶⁰ Here, assuredly, is revealed the need to have an independent governmental agency compile and publish police statistics.

the figures rising into the hundreds annually in the case of "Runaways."⁶¹

Arthur E. Wood made a study of arrests in Detroit.⁶² He found that from 1913-1919, 186,662 males were arrested upon all charges. Of these, 47,197 or 25.2 per cent. were discharged by the police "without recourse to the courts." During the same period, 40,493 females were arrested; and 12,767 or 31.6 per cent. were thus discharged by the police. In 1928, 56,681 persons, male and female, were arrested; and of these, 12,696 or 22.3 per cent. were discharged by the police.

The 1932 Detroit Police Report shows that for the Part I offenses of the Uniform Classification, 893 persons were released by the police and 4,426 were prosecuted. For the Part II offenses, 2,055 persons were released by the police, and 17,995 were prosecuted.⁶³ In addition, 20,510 persons arrested for drunkenness were released by the police in that year;⁶⁴ and apparently the same treatment was accorded 24,962 persons "detained for investigation." The ratios of the number of persons prosecuted (for Part I offenses) to those released by police were: for 1913-1919—2.62+; for 1928—1.51+ and for 1932—4.95+.

The 1932 Los Angeles Report shows many persons "released," apparently by the police without order of court. Most numerous are those released for robbery (1,399), burglary (1,027) and theft or larceny (790). For drunkenness, only 46 are reported "released"; for disorderly conduct, 118, and for vagrancy, 113. The total number "released" in 1932 was 4,837.

The reports from these three cities shed considerable light on the police practices in question. In Boston, the cases of drunkenness bulk largest in the figures for arrestees released by the police. But such release as regards drunkenness, if in accord with a special statute, is legal in Massachusetts.⁶⁵ Together with "disorderly conduct" and "suspicious persons," they con-

⁶¹ For drunkenness, approximately 35,700 persons were arrested each year, 1928-1933, of whom an average of about 23,000 were released at the station. But as shown in note 47 *supra* this practice as regards drunkenness has been legal in Massachusetts since 1891.

⁶² 21 J. Crim. Law and Criminology 168 (1930).

⁶³ Table V.

⁶⁴ Detroit has since 1914 (excepting 1919-1925) applied the so-called "golden rule" of releasing drunken persons when sober "without the necessity of going to court." From 1928 through 1932, over 20,000 persons have been thus treated annually in Detroit. (Detroit Police Department Reports, 1931 and 1932.)

Cf. "About two-thirds of the men arrested for drunkenness are dismissed by the Police, after sobering up, and are not taken into court." Kitchelt and Farrow, Report on a Minor Survey of the Administration of Criminal Justice in Hartford, New Haven, and Bridgeport, Connecticut, 17 J. Crim. Law and Criminology 375, 398 (1926).

⁶⁵ *Cf. supra* note 47. But Massachusetts is apparently unique in this regard. Hence the conclusions reached below as to the nation are not materially affected.

stitute the overwhelming majority of the cases thus treated. In Detroit, the cases of "drunkenness" and "detained for investigation" are also the largest by far. But Detroit also reports substantial figures for many other offenses,⁶⁶ including the major ones. The Los Angeles report shows a spread of such cases throughout the classification, with marked concentration in the offenses against property. As noted, relatively few cases are reported for drunkenness and the other categories that comprise the bulk of cases similarly treated by the police in Boston and Detroit. This disparity in records, the nature of these offenses, and available national statistics regarding them⁶⁷ suggest that the Los Angeles department does not record such cases; so, too, as regards the major offenses in Boston.⁶⁸ It is possible, of course, that in these cases the police invariably bring arrestees before a magistrate (or that the arrestees have given releases), just as it is possible, though much less so, that the Los Angeles police act likewise in cases of drunkenness, disorderly conduct, and vagrancy.⁶⁹

What national statistics are available? The Uniform Crime Reports state the number of offenses "cleared by arrest."⁷⁰ They also report the number of persons "charged," i.e. held for prosecution, and the number of "offenses known to the police." But several persons may have committed one offense. One person may have committed several offenses. Obviously, unless we know, in addition to the above, the number of arrestees, it is impossible to know how the police operate—whether they make one or a dozen arrests before a suspect is held for prosecution and an offense is "cleared."

The Uniform Crime Reports for 1934 represent a very important advance. The first attempt was there made to publish national statistics showing the number of persons arrested and *released by the police without being turned over for prosecution*. But the compilation is grossly inadequate:

⁶⁶ Cf. "During this seven-year period, 32,786 men were arrested on the charge of being disorderly persons. . . . Of this number 67 per cent were discharged by the superintendent of police after being held from a few hours to a few days." Arch Mandel, *Analysis of Arrests and Police Court Cases in Detroit*, 11 J. Crim. Law and Criminology 413 (1920).

⁶⁷ *Infra*, p. 362.

⁶⁸ Cf. The Cleveland Crime Survey reports (p. 236) that of every 1,000 felony arrests, 127 are disposed of by the police.

⁶⁹ E. J. Hopkins gives figures for releases by the police for Denver, Detroit, Los Angeles, New York and St. Louis. For St. Louis, he shows 86.2 per cent. of the number arrested for major offenses, released by the police—which seems very questionable. Hopkins, *Our Lawless Police* 84 (1931).

⁷⁰ Meaning by "cleared" merely that arrested suspects are held for prosecution. Note the definition in the Uniform Crime Reports: "Under the system of uniform crime reporting an offense is treated as cleared by arrest when the offender (sic!) is apprehended and held or turned over for prosecution."

In quite a large number of instances [of cities reporting] no entries were made. . . . In some instances definite statements were made on the reports that no records were maintained regarding such individuals, while on others there were no entries at all, or entries were limited to the three classifications pertaining to violations of motor vehicle and traffic laws.⁷¹

Such reports were disregarded. We are not told how many there were, nor what distribution of population or cities they represented. But for cities under 10,000 in population, such reports were tabulated even if the entries of the persons released were limited to traffic regulations. The given tabulation is based upon reports from 309 cities, with an aggregate population of 11,195,920. The potential importance of even these records sharply diminishes when we note that of these cities, only 16 have populations in excess of 100,000.⁷² One hundred sixty-seven, almost three-fifths, are from towns under 10,000. Where the problem is most acute, we are least informed.⁷³

The incompleteness of the data imposes sharp limitations. Sufficient is set forth, however, to indicate an enormous extent of illegal police practices. In some instances the data reveal the existence of acute problems—notably as regards “suspicion,” drunkenness, gambling, prostitution, vagrancy, assaults, crimes against property, and traffic violations of all sorts. In some instances (though not for all population groups), especially for gambling, “suspicion” and drunkenness, more arrestees were released than held for prosecution. In several other instances of the offenses noted, the number of persons released by police fell only a little short of that held for prosecution. A rough generalization on the basis of existing national statistics, is that, for many offenses, one of every three persons arrested is released by the police without being brought before any judicial officer.⁷⁴

⁷¹ Uniform Crime Reports, 1 Quart. Bull. 23 (1934). The statistics are for 1933.

⁷² But 43 cities, each with a population in excess of 100,000, reported persons held for prosecution.

⁷³ For 1934 (Table 15, 1 Quart. Bull. (1935)), the above statistics were continued, this time for 453 cities, total population, 13,339,695; 19 cities with populations, each, in excess of 100,000 and 236 cities or 52 per cent under 10,000 populations.

⁷⁴ The total number of persons arrested and released by police in 1933 was 311,877 (Table 14). The population represented is about one-eleventh of the total American population. On the basis of a very crude calculation (on the one hand very conservative since only 16 cities above 100,000 population are included; on the other hand deductions would have to be made for such situations as the Massachusetts drunkenness cases where a special statute exists), it appears that approximately three and one-half million illegal arrests and imprisonments were made in the United States in 1933. Obviously both the statistical and necessary supporting data are so incomplete as to make the above estimate little more than conjectural. But *for*

IV

The above statistical data supplement the appellate court cases previously examined. Even if many of the data be heavily discounted, it is apparent that the violations described there and others noted immediately above, constitute enormously widespread and frequent illegal practices by police. The two types of data combined make it possible to visualize certain typical activities of a large class of public servants, and to arrive at important conclusions regarding the efficacy of the rules designed to afford protection against them.

None the less there has been considerable growth in law designed to increase the protection of society by officials. Thus recent statutes have enormously enlarged the rights of officers to arrest without a warrant. Principally, these enactments have brought within the area of legal arrest, a vast number of misdemeanors which were not breaches of the peace at common law, and hence not subject to arrest without warrant even though committed in the presence of an officer.⁷⁵ Without statutory provision, courts have occasionally held that an offense is a felony *in order to legalize arrest without a warrant*, despite the otherwise unvaried interpretation of the same offense as a misdemeanor.⁷⁶

the present purpose, any minimum estimate appears to be so tremendous as to constitute the aggregate of such cases a serious problem. Thus:

Total—All offenses	1933	1934
Rate—held.....	6693.4	7885.6
Rate—released.....	2925.6	3956.4
Total.....	9619.0	11,842.0
released.....	30.4 p.c.	33.5 p.c.
held.....	69.6 p.c.	66.5 p.c.
Source: Tables 12 and 14, Uniform Crime Reports, 1 Quart. Bull. (1934).		
Tables 14 and 15, Uniform Crime Reports, 1 Quart. Bull. (1935).		

⁷⁵ The English statutes are summarized by C. E. H. Moriarty, *Police Law* 15-20 (1934). Cf. Maitland, *Justice and Police* 119-121 (1885). Similar provisions are common in the states, though many of them still retain the troublesome distinctions between felony and misdemeanor even when the offense is committed in the officer's presence.

⁷⁶ An apt illustration is provided by two Michigan cases. In *Drennan v. The People*, 10 Mich. 169 (1862), a police officer sought to arrest without a warrant a person charged with theft of a pair of gloves. For force used in effecting the arrest, he was later convicted of assault with intent to murder. A Michigan statute provided that: "The term felony when used in this title, or in any other statute, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished with death, or by imprisonment in the State prison." It was held by a divided court that this clause applied only to statutory offenses. The fact that petty larceny was punishable neither by death nor by imprisonment in the State prison did not mean that the offense was not a felony. The clause in no way affected common law felonies. Thus the court assumed that petty larceny was a felony at common law. (But cf. Campbell's, J., dissenting opinion in the *Drennan* case; also the writer's discussion of petty

Furtherance of public security is also illustrated by cases dealing with the effect of illegal arrest upon the jurisdiction of the court which tries the person thus arrested. A leading case is *Ker v. Illinois*.⁷⁷ Ker was wanted in Illinois upon charges of embezzlement and larceny. He was located in Lima, Peru. Henry G. Julian, armed with a governor's requisition and a presidential warrant was sent there to arrest him. But he did not present his documents to Peruvian authorities. Instead, he forcibly seized Ker and carried him on board the U. S. S. Essex, where he kept him prisoner until the vessel arrived at Honolulu. There Ker was transferred to another vessel and brought to San Francisco. Before his arrival, the Governor of Illinois had made requisition upon the Governor of California for his delivery as a fugitive from justice, and the Governor of California had entered his order for the surrender of the prisoner. Upon the latter's arrival at San Francisco he was immediately placed in the custody of an official from

larceny in Theft, Law and Society 298-301 (1935)). The right to arrest without a warrant was said to be "derived from the common law, and not from the statute." Accordingly, no legislative change in the punishment of an offense could affect the right to arrest as defined by the common law. A new trial was therefore granted the officer.

In 1885 Chief Justice Cooley was asked to depart from the rule laid down in the *Drennan* case. In the case before him the defendant had been convicted of murder of a policeman who sought without a warrant to make an arrest for petty larceny. Obviously, if the offense was a misdemeanor, the arrest was illegal and the defendant was within his rights in resisting even to the point of committing a homicide, if reasonably necessary. Cooley, C. J., suggested that the offense might in fact have been larceny from a store. In any event, he refused to set aside the rule in *Drennan v. The People*. ("... it may be doubted if the good of society requires that the right to arrest without warrant should depend in cases of larceny upon the value of the property stolen."). The conviction of the defendant for murder of a policeman was upheld.

Cf. State v. Grant, 79 Mo. 113 (1883), where a conviction for murder of a policeman was upheld. The policeman sought to arrest without a warrant, two men carrying a bucket of butter at night, which apparently had been stolen the day before.

On the other hand, it must be recognized that the right forcibly to resist arrest without a warrant in cases of misdemeanors, and the rule against the officers' use of weapons in such cases sometimes operate to render such (illegal) arrest both difficult and hazardous. But these rules must also be judged in the light of their actual operation, e.g., with reference to effective remedy for violations. In addition to the above, *cf. Wakely v. Hart*, 6 Binney (Penn.) 316 (1814), where there was an arrest without a warrant, and the defense was that the charge (receiving stolen property) was a misdemeanor. The court held: "Receiving stolen goods . . . is an offense which approaches very near to a felony, and its effects are more pernicious than the felony itself, for if there were no receivers there would be but few felonies," etc. Would the court have argued thus in a prosecution for receiving stolen goods? And *cf. Rohan v. Sawin*, 5 Cush. (Mass.) 281 (1850), and *Franklin v. Amerson*, 118 Ga. 860, 45 S.E. 698 (1903).

Evidence that the plaintiff might have been arrested for another cause is admissible in mitigation of damages. Note, 4 Rocky Mt. L. Rev. 235 (1932). And a policeman making an arrest under a void warrant, can reduce the damages in a suit against him by showing that he had reasonable ground to believe that the plaintiff had committed a felony. *Newburn v. Durham*, 10 Tex. Civ. App. 635, 32 S.W. 112 (1895).

⁷⁷ 119 U.S. 436 (1886).

Illinois. He was later tried there and found guilty of larceny. The Supreme Court held that "due process of law" applied to the trial of a case, not to previous proceedings. That disposed of the kidnapping of Ker in Peru. In similar vein, it was held that as regards the illegal extradition from California, he should have sought relief by way of *habeas corpus*. The Illinois conviction was therefore affirmed. But Mr. Justice Miller felt impelled to add that the decision did not leave Ker or the government of Peru without remedy. Peru could, under its treaty with the United States, demand surrender of Julian upon a charge of kidnapping. Ker could sue Julian for trespass and false imprisonment, "and the facts set out in the plea would without doubt sustain the action." But as to recovery of "a sufficient sum to justify the action," the only difficulty which occurred to Mr. Justice Miller was that this "would probably depend upon moral aspects of the case, which we cannot here consider."⁷⁸

The analogy of the rules admitting evidence illegally acquired is apparent. But whereas there authority is divided, here the rule is practically universal that "it [is] immaterial . . . whether [he] had been arrested legally or illegally, or arrested at all, before the complaint was made."⁷⁹ The only limitation on the rule permits the raising of objections prior to trial. But that is of little value since it is permissible to re-arrest the defendant immediately upon his release.⁸⁰ At his trial, evidence acquired by illegal imprisonment and "third degree" methods, short of amounting to a confession, is generally admissible.

The spread of statutes bringing numerous offenses within the area of legal arrest without a warrant, the decisions of courts construing certain offenses, normally misdemeanors, as felonies, for the purpose of arrest, the rejection of the manner of arrest, however illegal, as irrelevant to the jurisdiction of the court which tries the arrestee, the introduction of evidence

⁷⁸ In a New York case where the court held that "a conviction should not be set aside because the defendant was illegally arrested," they were careful to add that: "This rule does not deprive the defendant of the benefit of the provisions of the law relating to arrest. If it turns out that he is illegally arrested he has his remedy in action for false imprisonment." *People v. Park*, 156 N.Y.S. 816, 92 Misc. 369 (1915). Thus have judges quieted their consciences—while attaining what they regarded as the major objective.

⁷⁹ *Commonwealth v. Conlin*, 184 Mass. 195, 68 N.E. 207 (1903). The doctrine has been applied to administrative officers in certain cases—with very interesting results. Thus in a California case, a woman was illegally arrested, then examined by a physician connected with a city health department, who found her to be afflicted with a contagious infection, and (under a statute) ordered her to be quarantined and treated. The entire proceedings were sustained by the court. *Application of Johnson for a Writ of Habeas Corpus*, 40 Cal. App. Rep. 243 (1919).

⁸⁰ The authorities are collected in Note, 38 Harv. L. Rev. 114 (1924); Note, 24 Mich. L. Rev. 192 (1925); Note, 25 Mich. L. Rev. 193 (1926); Vorhees, *The Law of Arrest* 185-6; 4 American Digest § 143 (1898).

secured, in part, as a result of illegal arrest—all of this expansion of legal doctrine reveals numerous efforts to provide protection by police against socially dangerous persons by facilitating their apprehension and incarceration. Clearly this does not mean that either rules or practices or both, *adequately* afford protection. Indeed, the contrary is all-too-probable. But it does mean—if one has an eye to increase in actual security rather than to mere cumulation of rules—that the problem is much too complex in a culture such as ours, to be successfully dealt with by reforms directed solely at one aspect of the social need.⁸¹

Such disparity between rules and practices as that described, may be regarded as symptomatic of difficult social problems. In this view, the practices result, in part at least, from *inadequate legal* provision for coping with the social need.

No doubt the problem of safeguarding the normal population from the subnormal and maladjusted is, under present conditions, tremendously acute. As between strict adherence to outmoded rules, and practices at odds with such rules, the latter may well be the lesser evil. But that alternative, as a deliberate policy, cannot in a society constructed upon law, be a permanent one. In relation to such an hypothesis, at any rate, is the above discussion relevant. Neither condemnation of police practices, in themselves, nor reaffirmance of "individual rights" is here involved. Rather the problem is analogous to those resulting from the social conditions consequent upon the Industrial Revolution. Those problems focusing on the differentiation of official from lay right, and disclosing the expansion of the former, can be analyzed in terms of the clash between the demand for security and opposing forces designated as "political values." Similarly, here and now, we have to deal with an inter-play of forces which operate upon a balance as delicate as it is potent.

In the contemporary problem, lay enforcement of the law—as regards arrest—recedes. We deal almost entirely with officials. We deal with official practices at odds with official rights. We note pressing social problems that call forth such violations of the rules—not as sporadic, occasional acts but as habitual, organized, even publicly approved. We note unfortunate consequences of the disparity between practices and rules. We are led,

⁸¹ The above analysis is in certain respects a simplification (necessary for the purposes in hand) of vastly more complex phenomena than appear. The processes that may be viewed as tending respectively towards protection by and protection against a professional force, are reciprocal ones. Official practices, as responses to the stimuli of social need, constitute one phase of the problem. The other relates to the theory noted in the writer's historical discussion of arrest, *op. cit. supra* note 1, regarding the tendency of official practices to become law. In that connection see the writer's suggestions for reform, *infra*.

thence, to a search for norms that will meet the new needs—social and political.

Legality of arrest hinges most frequently upon the discharge of duties after the apprehension of the arrestee. Traditional legal duty calls for appearance before a magistrate. But traditional treatment of the bulk of the cases described is recognized as futile. Changed mores, realization that large classes of persons (generally recognized as obnoxious because of their status rather than because of any serious social damage done) are not dangerous, combined with the persistence of laws enacted for a medieval, rural, static society—these have produced the problems that perplex contemporary officials. The incidence of some of these problems was described in the above analysis of appellate court cases and statistical data. It remains to consider them briefly in relation to the social purposes involved, and with a view to indicating avenues to a sounder manipulation of social and legal instrumentalities.

1. *Drunkness*.—The widespread and frequent practice of arrest and release without appearance in court in such cases, undoubtedly has a long history. It is much older than the Boston Police Report of January, 1851, which recites that "persons arrested for drunkenness . . . were detained until sober and then discharged." Arrest of drunken persons consumes a large part of the time and energy of police officers. In 1890, Mr. George W. Hale of the Lawrence, Massachusetts, Police Department, compiled some very interesting statistics from questionnaires sent to the police of about 250 American cities. In many cities he found that the vast majority of all arrests was for drunkenness. The maximum incidence of such arrest was in a group of cities where the percentages ranged from eighty to eighty-six per cent. of all arrests.⁸² Hence the problem of more efficient expenditure of police energy is acute at this point.

The statistics on such arrests and releases bear eloquent testimony to the shortsightedness of the policy pursued. No doubt the same persons are arrested time after time. In many cases the records extend over a long period of years, and show an incredibly large number of arrests, suspended sentences, fines and brief incarcerations. Such "treatment" serves no purpose other than to facilitate re-arrest—and upon the same charge. These persons and similar delinquents, both before and after sentence, crowd the jails to such an extent that the prisons burst from over-population, and courts are driven to modify their treatment of more serious offenders.

⁸² Ratio of Arrests for Drunkenness to Total Number of Arrests: Key West, Fla.—.86; Oil City, Pa.—.84; Pottsville, Pa.—.81; Battle Creek, Mich.—.80; Jacksonville, Fla.—.80. Source, Table D., Hale, *Police and Prison Cyclopaedia* 165-8 (1892).

The necessary objectives for reform are clear: (1) removal of serious conflict between rules and practices; and (2) the adoption of a socially intelligent policy of treating such delinquents. In the formulation of this policy it would be necessary to consider: (a) the types of offenders, who are usually the victims of an inferior economic status⁸³ and/or of alcoholism or other disease; and (b) the fact that these offenders do not arouse strong public emotion, and that hence it is possible to treat them in any manner dictated by available knowledge and desired social ends.⁸⁴

2. *Vagrancy, "suspicious person," "having no lawful means of support."* Historically, the purpose of these laws was to do what they purported to do. Having no lawful means of support ran counter to the mores of simple, rural societies.⁸⁵ Far back into Anglo-Saxon society are found dooms against begging and vagrancy. From then up to the present time, a torrent of legislation has prescribed traditional punitive treatment. And the number of homeless, propertyless, misfit and irresponsible persons has swelled into the many thousands.⁸⁶

Yet these laws remain upon our statute books in their traditional form.⁸⁷ Change in mores has resulted only in the same crude practice that characterizes the handling of drunkenness cases. Every large city has thousands of homeless, unemployed men and women who persist in getting into the way of police officers. The police operation is one of very superficial prophylaxis—an overnight removal of these unsightly elements from the city streets.⁸⁸ The utter impotence of this class of arrestees is ample guarantee

⁸³ This is probably a constant factor. The well-to-do inebriate rarely falls into the hands of the police.

⁸⁴ Hospitalization, suitable detention homes, and contact with social service agencies seem obvious avenues for reform. For an example of arrests and detention to provide thorough treatment, see Dietzler, *Detention Houses and Reformatories as Protective Social Agencies in the Campaign of the United States Government Against Venereal Diseases* (1922).

⁸⁵ As to treatment of vagrants in 1800 under the most abominable prison conditions imaginable, see *An Impartial Statement of the Inhuman Cruelties Discovered in the Coldbath-Fields Prison*, *supra*, note 59, at 12-13.

⁸⁶ For a most interesting book, see Ribton-Turner, *A History of Vagrants and Vagrancy* (1887). A long list of statutes starting from the Anglo-Saxons in 673 is appended, pp. 675-697.

Cf. Ferri, *Criminal Sociology* 261-4 (1917); and John Adolphus, *Observations on the Vagrant Act* (1824).

⁸⁷ See Mass. Gen. L. 1921 c. 272, §§ 53, 54, 63, 64, 66; Vol. 2, § 53 especially reads like a chapter in Elizabethan times: "Rogues and vagabonds, persons who use any juggling or unlawful games or plays, common pipers and fiddlers, stubborn children, runaways, common drunkards, common nightwalkers, both male and female, etc." *Cf.* Cal. Stat. 1929 c. 35, § 1; 3 Callaghan's Ill. Stats., 1924 c. 38, par. 606, no. 270, pp. 2676-7.

⁸⁸ Edith Abbott gives a long list of the behavior brought under the disorderly conduct charge in Chicago—including many such as: "2012, no home, discharged"; "pool room raid,

that they will not employ attorneys or otherwise annoy the police. The same observations made above, as to the necessary directions for reform in drunkenness cases, apply here with even greater force. Indeed, it is becoming more and more apparent as medical, psychiatric and criminologic knowledge increases, that the vagrant, the drunkard (frequently a chronic alcoholic), the drug addict, the prostitute, the petty thief and others, should be separated in theory as well as in practice, from the truly criminal, and given treatment according to their needs.

Recently such statutes have been used to harass notorious criminals whom it is impossible to convict for major offenses. The utility of vagrancy statutes and related laws making it criminal to have "no lawful means of support," was pointed out in 1915 by the Chicago City Council Committee on Crime.⁸⁹ Since then many cities have resorted to these laws to arrest repeatedly, to punish, and thus to expel criminals from their jurisdictions.⁹⁰

Finally, these statutes are frequently used to assist the police in their investigation of serious crimes. They may desire information and arrest a "suspicious person"⁹¹ in order to interrogate him. They may arrest a num-

discharged"; "2012, sleeping in wagon, discharged"; "2012, sleeping in alley, drunk, discharged"; "2012, out of work, 1 month, probation 6 months; F. W. for sleeping on the prairie because he had just got a job and had no other place to go that night." Recent Statistics Relating to Crime in Chicago, 13 J. Crim. Law and Criminology 338-9 (1922).

⁸⁹ Pp. 170-172. The Committee pointed out that ordinarily the charges were "disorderly conduct," which resulted in a small fine or complete discharge. Under the vagrancy law, sentence of six months imprisonment was possible.

⁹⁰ E.g., "Mayor Hague yesterday gave the formula that he said had been effective in frustrating racketeers: 'Don't wait for a complaint against him. Jail him and keep jailing him until he leaves town. . . . In Jersey City, the police bear the brunt. They don't wait to see a crime committed. They don't wait for a complaint. When a gangster or racketeer shows up, we lock him up under the Disorderly Persons Act. There's no bail. He gets ninety days. When he gets out and persists in hanging around, we give him another jail dose. We keep that up until he departs.'" N.Y. Herald Tribune (about May 4, 1933).

In New York City, until recently, only those consorting for unlawful purposes were punished (§ 722). In February, 1935, the city magistrates began to apply § 877, an old vagrancy law, against known criminals. N.Y. Times (Feb. 22, 1935). It is now the *presumption* that the purpose was unlawful. See *People v. Pieri*, 269 N.Y. 315 (1936).

Cf. c. 793, 722, 11 Gilbert's Ann. Cr. Code of N.Y. 1932, at 266a, and *People v. Greenberg*, 142 N.Y. Misc. 681 (1932); *People v. Sheehan*, 142 N.Y. Misc. 679 (1932); the Mass. Stats. *op. cit. supra* note 87, § 68, and *Commonwealth v. Ellis*, 207 Mass. 572, 93 N.E. 823 (1911). Note how these statutes lump vagrants with thieves and pickpockets, e.g. Cal. Stat. 1929 c. 38, § 1, no. 4.

⁹¹ For criticism of the offense "general suspicion" on the basis that no particular criminal act is thus alleged, see *Stoutenburgh v. Frazier*, 16 App. D. C. 229, 48 L. R. A. (D. C.) 220 (1900); for like criticism of an indictment charging a person as a "peace breaker," see *Robisan v. Miner and Haug*, 68 Mich. 549, 37 N.W. 21 (1888).

ber of suspects, and by a process of elimination, decide upon the guilty one.⁹² Again, they may suspect someone of having committed a major offense, and fear that he will leave the jurisdiction before they can secure the evidence necessary to support a complaint.⁹³ Or they may wish to compel such a suspected person to confess or to supply evidence against himself. The arrest is made for being a "suspicious person."⁹⁴ The problem is quite different from those involving drunkenness, vagrancy or prostitution. The difficulties confronting the police are many. But the need revealed by reliance upon vagrancy statutes should not be met by such indirection.

3. *Illegal imprisonment pending investigation.*—The practice of deliberate detention to facilitate investigation (quite apart from arrests upon "suspicious person" statutes), is by no means peculiar to American police. It is of frequent occurrence in England.⁹⁵ The report of the Royal Commission of 1929 states the reason for its continuance: "the police have to work very rapidly very often." Sir Archibald Bodkin, Director of Public Prosecutions insisted that there was a sharp distinction between detention and arrest. A person detained: "is not treated as a prisoner; he is not put in any cell; he waits in a waiting room . . . he has a room and bed there; . . . the Police . . . treat them well, they feed them well."⁹⁶ The detention lasts two or three days, never more than four. But the Commission rejected Sir Archibald's view that detention differed from arrest. A person "requested" to accompany an officer to a station to be "detained" there, invariably complied. Although placed in a waiting room, a detained person would not be permitted to leave the station. Yet there is neither statute nor regulation authorizing such detention.⁹⁷ On the continent, how-

⁹² Cf. Report of the Royal Commission 57-8 (1929).

⁹³ Cf. "This practice is recognized by the Metropolitan Police, who regard themselves as free to question the man on the major crime, after his arrest on the minor charge, under Nos. (1) and (3) of the Judges' Rules. . . ." *Id.* at 59.

⁹⁴ E.g., "It appears from the affidavits on this case that there had recently been committed within the city of Richmond a felony of the gravest nature. Acting upon information in his possession, the police officer arrested Claude Hill upon suspicion of being the perpetrator of this crime. Instead of charging him, however, with being suspected of this specific offense, he was arrested and held merely as a suspicious character." *Hill v. Smith*, 107 Va. 848, 59 S.E. 475 (1907).

⁹⁵ Report of the Royal Commission on Police Powers and Procedure 56-57 (1929). The Commission mildly censured the practice, and recommended reliance upon the "delayed charge" which allows twelve hours for investigation prior to bringing the accused into court. *Id.*, § 158, p. 59.

⁹⁶ Minutes of Evidence Taken before the Royal Commission on Police Powers and Procedure, §§ 1385, 1389, 1390 (1928).

⁹⁷ "5067. Has anybody ever brought a case before the Courts of having been illegally detained?—Offhand I should say I do not know of any because as a rule the Police are pretty

ever, a distinction in law has long been made between arrest and detention—no charge and no reasonable ground of suspicion being necessary for the latter.⁹⁸

We need not be surprised that "detention" is also practiced by American police⁹⁹ although its enormously high frequency discloses an especially serious problem. Our police make no distinctions as regards taking into custody for different purposes. They provide no separate quarters for those merely "detained." There is no different treatment of any kind—except that persons held in custody without being legally placed under arrest are much more frequently subjected to abuse.

If serious abuses could be eliminated, only nominal damages would normally be risked by a community which permitted conflict between rules and practices to exist. It would simply be deliberately recognized that any political instrumentality is apt to depart from its prescribed sphere of operation, and that remedies should be provided for those who suffer thereby. That, in part, is the present situation aggravated by gross abuses and the lack of effective remedies. That the problem is a very difficult one is apparent. The police have great obstacles to overcome in their efforts to accumulate evidence. Hence there might be much said in defense of the practice of detention of suspects pending investigation *if adequate guarantees against abuse were available*. But such detention—certainly in its present character—immediately conflicts with traditional political ideals, whereby it is insisted that individuals who have committed no wrong shall be absolutely unmolested. The resolution of such conflicts provides the greatest contemporary challenge to all students of government.

In the solution of this problem, as it concerns the present inquiry, it is necessary to consider the principal difficulties which our police encounter.

well certain of their ground, and they run the risk." Witness: Mr. F. Freke Palmer, Solicitor; *Id.*, at 331. For such an action, see 97 J. P. at 135, discussing *West v. Williams and Coker*, a *nisi prius* case.

"If these two words [detention and arrest] do not mean the same thing, the action denoted by the first has no warrant in law. . . . Police powers of detention are unknown to the law. The distinction is not unconnected with the supposed necessity for the 'caution.' If a person is under arrest, he must be 'cautioned' in the well-known form laid down by the judges; if he be only detained, reasons the police officer, he can be left to make statements without being scared off doing so, or can even be questioned." Detention or Arrest, 71 Solicitor's Journal 610 (July 30, 1927).

⁹⁸ Fosdick, *European Police Systems* at 17 (1915).

Again in the books, we eschew the Razzia System of the continentals. But our papers constantly report such facts as "400 in Roundup," "Police Seize 191 in Crime Roundup," and so on.

⁹⁹ Cf. Beeley, *The Bail System in Chicago* 24-26 (1927); and the Report of the Am. Bar Ass'n Committee on Lawless Enforcement of Law (1930).

They constitute the fundamental problems which must engage the attention of those interested in improving the effectiveness of police work. Countries whose police achieve a relatively high degree of success in the detection of crime and the apprehension of criminals operate under two fundamental advantages over American police. They have to deal with a relatively stationary population; ours is a very mobile one. They also enlist general public support;¹⁰⁰ our police must depend very largely upon their own efforts.¹⁰¹ Mobility of our population will continue. Accordingly, enlistment of public support is at once the most important and the most likely problem with which we need to deal. How can the advantages of the earlier, traditional system of reliance upon the total population for assistance in crime detection and apprehension of offenders be secured to the fullest extent consistent with modern conditions?

The principle formulated in the above analysis and tested over a long period of history,¹⁰² supplies valuable guidance, namely—elimination of illegal and abusive practices¹⁰³ by police as the essential prerequisite to the

¹⁰⁰ "In other lands the Police are regarded as only representing the Executive Government, whereas with us they belong to the people. And as a result of this, our Police are always ready to help the citizens, and can always count upon receiving help from them in return." Sir Robert Anderson, *The Lighter Side of My Official Life* 264-265 (1910).

That serious problems persist is of course obvious. See the list of abuses by police set forth in Appendix D in the Report of the Police Commission (1929), and Wright, *Police and Public* (1929).

But in England there is not only sharp criticism of police practices which are commonplace here but also determined efforts by *persons in authority* to remove the evils—e.g. the Savidge and the Shepherd cases.

So, too, disciplinary measures against police are relatively prompt and effective. Cf. "Sometimes summonses are applied for against the police for alleged assaults. Invariably such summonses are granted. It is vital that both the public and police should realize that if the law protects the police against the public it also protects the public against the police." Cairns (a metropolitan magistrate), *The Loom of the Law* 266 (London, about 1923).

Cf. for Chicago "Examination of the hearing docket discloses that the relatively few penalties imposed by the [Police Department Trial] Board are not heavy and that only in the rarest instances does it even approach the full exercise of its power to recommend suspension for thirty days." *Chicago Police Problems* 75 (1931). See *id.*, at 78-79, showing that dismissed policemen are almost invariably reinstated.

¹⁰¹ And they must employ an enormous number of informers. E.g. "Stool-pigeons were a costly item in the police budget. Lieutenant Pfeiffer testified that the average monthly bill submitted by each officer was \$35. In the whole city the taxpayers paid approximately \$100,000 per year for the use of these informers." Final Report of Samuel Seabury In the Matter of the Investigation of the Magistrates' Courts, etc., 84 (1932).

¹⁰² See the writer's article *op. cit. supra* note 1.

¹⁰³ The problem is to improve the *practices* not merely to prescribe rules and regulations. Cf. "The real protection of the individual lies not in regulations which may be ignored, but in a high standard being maintained by the Police force." Minutes of Evidence Taken Before

enlistment of public support, and hence to efficient detection and arrest. If one might venture a metaphor and a broad generalization to describe what is really a very complex process, one might state that the public normally asks a price for its collaboration: police practices consistent with political values and effective legal remedies for official lawlessness. Yet, irrational though it be, there is also wide acquiescence in the illegal arrest of thousands of persons, for drunkenness, vagrancy, suspicion of felony, and in much more serious abuses, as well. Such acquiescence (resulting from lack of knowledge of what goes on, from failure to grasp the significance of known facts in relation to the problem as a whole, and from a consequent belief that results deemed desirable justify ends deemed necessary—all augmented by emotional responses set off by sensational cases) has helped to root these practices deeply in police work.¹⁰⁴ Failure to provide compensation for persons seriously injured by the police has reenforced these practices. Respectable persons sometimes get caught in the enormous mill. They join the thousands of individuals of inferior economic status in their hostility to police. Common knowledge of abuses leads generally, at least to indifference, and more often, to dislike. These facts find wide acceptance. But it is necessary to understand and to demonstrate as fully as possible, that, *in the long sweep of events, abuse by police is at the expense of protection by police.*

In addition to adoption of sound social policies regarding treatment of large numbers of maladjusted, relatively harmless persons who swell the statistics on illegal arrest, several legal reforms should be instituted. Most important would be revision of the rules of law to accord with these sounder modes of treatment. Next is provision of adequate remedies to compensate persons injured by policemen. A community which pays the bill will not long tolerate habitual lawlessness.¹⁰⁵ The resulting higher standard of police behavior may be expected to compel more effec-

the Royal Commission on Police Powers and Procedure 541 (1928). (Witness: Mr. Horace Marshall, Stipendiary Magistrate, Leeds.)

"Police work in this country . . . is in many ways comparable to a skilled handicraft and the aim should be not the elaboration of codes of rules and regulations so much as the selection of the best personnel, and improvement of the training of recruits and the instruction of constables after their appointment, and the maintenance of the best traditions of the Service." *Id.*, at 6. (Witness: Sir Ernley Blackwell, K.C.B., Legal Assistant Under Secretary of State, Home Office, on behalf of the Secretary of State.)

¹⁰⁴ I have only touched upon a few types of illegal practices. A formidable list is discussed by the National Commission on Law Observance and Enforcement, and the Am. Bar Ass'n Committee (cited above).

¹⁰⁵ Every improvement in personnel will diminish such liability.

tive disciplinary action within the police department itself as well as by civil service commissions. It should also facilitate successful prosecution of policemen for the more serious abuses.¹⁰⁶ The practice of securing releases from persons who have not been abused while in their custody, would not only help to impress upon police their duty to arrestees, but would also reduce the numbers they would be required to bring into court. Such procedure, while dangerous in the hands of abusive police, would be a boon in the hands of law-respecting officials.

Much of this calls for more intelligent utilization of present resources within existing authority. The same principles regarding maintenance of an equilibrium between official practices and political ideals, realized through effective legal remedies, apply to proposals to extend the powers of police. Experience has accumulated to such proportions in other directions that it is possible to arrive at certain conclusions with assurance. Thus it is clear that we should abolish the archaic classification of felony and misdemeanor and with it the fiction which, among other absurdities, requires a policeman to determine on the spot and under exciting conditions, questions upon which supreme court judges differ after considerable deliberation.¹⁰⁷ But most reforms that are urged are not so clearly desirable. How to evaluate them, how to rest their validity upon a sounder basis than mere opinion, is the general problem of greatest concern to students of human affairs. In recent years we have seen recommendations to provide a simple and a legal method of interrogating suspected persons, to enlarge the right to search and seize, to forbid resistance to arrest under any circumstances, and to institute other reforms.¹⁰⁸

All of these measures may well be considered in a long-range program of reform. But it is one thing to block out objectives; quite another prob-

¹⁰⁶ Cf. "I therefore recommend:

"Not merely that the law be adhered to, but that, wherever it appears before a Magistrate that the arrest has been unlawfully made by the police, it shall be his affirmative duty to receive evidence against the officer making the arrest, and to hold him to await the action of the proper authorities." Seabury, *op. cit. supra* note 101, at 214-15.

¹⁰⁷ "A simplification of the law by basing the right to arrest on some broad principle (which is not the case at present) is highly desirable." Witness: Mr. D. Lleufer Thomas, LL.D., Stipendiary Magistrate, Pontypridd and Rhondda. Minutes of Evidence Taken before the Royal Commission on Police Powers and Procedure at 512 (1928). See, too, the pointed remarks of W. S. Hughes, Chief Constable of the Lincoln City Police, *id.* at 561.

¹⁰⁸ Cf. Professor Waite's proposals as to the officers' right to use force in making arrests; also to permit introduction of evidence of actual guilt of the arrestee even though the officer did not know of any reasonable grounds to suspect guilt at the time of the arrest,—Some Inadequacies in the Law of Arrest, 29 Mich. L. Rev. 448 (1931); and Public Policy and the Arrest of Felons, 31 Mich. L. Rev. 749 (1933).

Cf. Professor Bohlen's view that it is not wise to give officers the right to arrest for all mis-

lem actually to incorporate the desired reforms into institutions run on habit, and adapted to and molded by important social problems. Yet, if we can conceive the problem as a significantly integrated unit—though composed of parts that are unique—if, for example, we can understand that there is a vital, multilateral relationship between few arrests for many crimes and public disapproval of police, between wholesale illegal practices and inadequate provision for compensation, between serious social problems treated with indiscriminate superficiality and these self-same illegal practices, then we may at least develop sure techniques for approaching our problems intelligently and with some expectation of achieving a fair degree of success.

demeanors committed in their presence: "After all we should not in our desire to punish crime, overlook the interests of individuals." 75 U. Pa. L. Rev. 489 (1926).

Cf. too: "The observance of the rule of law that, in misdemeanor cases, the police are not authorized to arrest without warrant, where the offense is not committed in their presence, would have obviated the making of many unlawful arrests of innocent women, and would have eliminated other serious abuses." Seabury, *op. cit. supra* note 101, at 102.